

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	4:03CR3100
)	
v.)	
)	
TIMOTHY S. DEGARMO,)	MEMORANDUM AND ORDER ON
)	DEFENDANT’S REQUEST FOR LEAVE
Defendant.)	TO FILE A SECOND MOTION UNDER 28
)	U.S.C. § 2255

On January 27, 2010, the defendant, Timothy S. Degarmo, filed in this court a “request [for] the Court to grant permission to do a Second Successive 28 U.S.C. § 2255” motion. (Filing 224 at 1.)¹ I lack the authority to grant the defendant’s request. Section 2255(h) states that “[a] second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals.” (Emphasis added). In turn, section 2244(b)(3)(A) states, “Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” I shall therefore deny, without prejudice, the defendant’s request for leave to file a second § 2255 motion.

There is authority holding that when a prisoner sends to the district court a request for permission to file a second or successive § 2255 motion, the district court should transfer the request to the court of appeals. See, e.g., In re Sims, 111 F.3d 45, 47 (6th Cir. 1997). I shall not follow that approach in this particular case. Although the defendant has identified the reasons why, in his view, his request for leave to file a second § 2255 motion ought to be granted, he has not attempted to explain why these reasons satisfy the requirements of 28 U.S.C. § 2244(b)(2).

¹The defendant’s filing is captioned, “Request for Certificate of Appealability for a Second Successive 28 U.S.C. § 2255 Motion.” (See filing 224.) It is clear, however, that he seeks not a certificate of appealability, but rather leave to file a second or successive § 2255 motion. (See generally filing 224.)

(See generally filing 224.) In order to allow the defendant an opportunity to fully explain to the Eighth Circuit Court of Appeals why his request for leave to file a second § 2255 motion should be granted, I shall not transfer his request to the court of appeals; instead, the defendant should file a new, separate motion in the court of appeals for an order authorizing me to consider a second § 2255 motion. Cf., e.g., Carter v. King, Civil No. 08-2202 JMR/FLN, 2008 WL 2959933, *3 n.5 (D. Minn. July 29, 2008).

IT IS ORDERED that the defendant's "Request for Certificate of Appealability for a Second Successive 28 U.S.C. § 2255 Motion," filing 224, is dismissed without prejudice.

Dated February 16, 2010.

BY THE COURT

s/ Warren K. Urbom
United States Senior District Judge